Supreme Court, U.S.
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No. 93-691

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FRANCIS AND MARGARET PISCIOTTA,
Petitioners,

v.

SMITH BARNEY SHEARSON INC.,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES R. MILLS
(Counsel of Record)
MICHAEL SOLINSKY
LORD DAY & LORD, BARRETT SMITH
1201 Pennsylvania Avenue, N.W.
Suite 821
Washington, D.C. 20004
(202) 393-5024
Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - WASHINGTON, D.C. - 20001

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QUESTION PRESENTED

Whether a party to an arbitration proceeding subject to either the District of Columbia Uniform Arbitration Act, D.C. Code § 16-4301, *et seq.*, or the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, may bring an independent civil action for damages to redress alleged fraud in a concluded arbitration proceeding, where (1) the civil action is not a remedy authorized by either statute, and (2) the action was not commenced within the time period prescribed to seek judicial review after notice of the alleged wrongs?

PARTIES TO THE PROCEEDING

The Petitioners in this civil action are Francis and Margaret Pisciotta. The Respondent is Smith Barney Shearson Inc., which is the successor in interest to Shearson Lehman Brothers Inc., the Defendant and Appellee below, with respect to the claims in this action. In compliance with Rule 29.1, Respondent discloses that its corporate parent is Smith Barney Shearson Holdings Inc., whose corporate parent is Primerica Corporation. Respondent has no nonwholly owned subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Smith Barney Shearson Inc., by and through its counsel of record herein, respectfully opposes the Petition of Petitioners Francis and Margaret Pisciotta for a Writ of Certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINION BELOW

The opinion of the District of Columbia Court of Appeals is reproduced in the Appendix to the Petition at pp. 1a-11a and is reported at 629 A.2d 520.[1] The Order of

[1] Citation to the Appendix will be to "App. at ——."

Dismissal of the District of Columbia Superior Court, which was entered on March 4, 1992, is not reported but is found at page R.165 of the Record as certified by the District of Columbia Superior Court to the District of Columbia Court of Appeals.

JURISDICTION

The Petition states that the jurisdiction of this Court is invoked under 28 U.S.C. § 1257. The only conceivable basis for review under that provision is a premise that the District of Columbia Court of Appeals' opinion constitutes a final judgment where the validity of a statute of the United States is "drawn in question." The United States statute purportedly in issue is the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* The Court of Appeals held, however, that the issue regarding which arbitration statute—the FAA or the District of Columbia Uniform Arbitration Act—governs the resolution of this case was never joined. (App. at 4a.) The Court of Appeals' opinion principally construes the District of Columbia Uniform Arbitration Act (App. 4a-5a), not the FAA. The Court of Appeals, however, held that under either statutory scheme, Petitioners' civil action is not authorized and must be dismissed.

STATUTES INVOLVED

The decision of the District of Columbia Court of Appeals construed the District of Columbia Uniform Arbitration Act, District of Columbia Code § 16-4311, and Sections 10 and 12 of the FAA, 9 U.S.C. §§ 10 and 12.

STATEMENT OF THE CASE

Petitioners' civil action seeks compensatory and punitive damages and attorneys' fees for alleged wrongs which allegedly occurred in a prior, concluded arbitration between Petitioners and E.F. Hutton & Company Inc. ("E.F. Hutton") and its former employee, Elizabeth Christian-

son.[2] Petitioners' complaint asserts that alleged false testimony by Ms. Christianson and alleged misconduct by E.F. Hutton's in-house trial counsel during discovery and during the arbitration hearing give rise to independent actions for breach of contract, fraud, negligent misrepresentation, and prima facie tort. The complaint does not allege any quantification or calculation of Petitioners' alleged damages.

Respondent respectfully refers the Court to Section I of the opinion of the Court of Appeals for an accurate statement of the relevant facts and procedural history of this action. (App. at 2a-4a.) The following additional pertinent facts should also be considered.

The arbitration proceeding commenced by Petitioners in September 1986 was not the subject of a predispute agreement mandating arbitration of the claims. Rather, Petitioners, through the same counsel who represents them with respect to this Petition, voluntarily and on their own initiative commenced arbitration of their claims before the National Association of Securities Dealers, Inc. ("NASD"). Pursuant to Section 1 of the NASD Code of Arbitration, E.F. Hutton, as a member of the NASD, was required to arbitrate the dispute. Similarly, Ms. Christianson, as a person associated with an NASD member, was required to arbitrate the claims, too.

Petitioners' original arbitration claim for statutory violations and common law claims, in addition to seeking compensatory damages of $183,000, sought treble damages, punitive damages, interest, costs and attorneys' fees.

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[2] In 1988, E.F. Hutton merged with Shearson Lehman/American Express Inc. to form the firm of Shearson Lehman Hutton Inc. Subsequently, Shearson Lehman Hutton Inc. became Shearson Lehman Brothers Inc. ("Shearson"), the Appellee/Defendant, below. Subsequently, Smith Barney & Harris Upham Inc. acquired assets of Shearson and formed the Respondent here, Smith Barney Shearson Inc.

The arbitration award, in addition to holding E.F. Hutton liable to Petitioners for $40,000 and dismissing all claims against Ms. Christianson, held that the parties shall each bear their own respective costs, including attorneys' fees. There is no dispute that in July 1988, the successsor to E.F. Hutton, Shearson Lehman Hutton Inc., tendered and Petitioners accepted a check in the amount of $40,000 in full and final satisfaction of the award.

As the Court of Appeals' opinion recounts (App. at 2a), in April 1990 Petitioners filed before the NASD a new and second arbitration claim seeking arbitration of the claims now stated in their civil action. Shearson objected that Petitioners were merely trying to reopen the earlier award and specifically advised the NASD *and Petitioners* that to the extent Petitioners believed any fraud was involved in connection with the prior arbitration proceeding, Petitioners must follow the prescribed remedies under the FAA and any applicable state arbitration statutes, none of which authorized the filing of a second arbitration claim. Based on Shearson's objection, the NASD, pursuant to Section 12(b) of the NASD Code of Arbitration Procedure, refused Petitioners' request to proceed with the second arbitration.

Notwithstanding the certitude with which the Petition states allegations of wrongdoing on the part of E.F. Hutton, its attorney, and Ms. Christianson, Petitioners' allegations have never been adjudicated and are rejected by Respondent. For purposes of deciding Shearson's Motion to Dismiss in the Superior Court, the allegations of the complaint, however, as required by the District of Columbia's Superior Court Rules, were assumed to be true.

REASONS FOR DENYING THE WRIT

I. THIS CASE IS NOT AN APPROPRIATE ONE FOR THE COURT TO DECIDE THE QUESTION PRESENTED.

Petitioners' civil action, by seeking damages for alleged wrongs by Respondent's predecessor in a concluded arbitration, is a transparent attack on that arbitration and is outside the exclusive procedures and remedies of the District of Columbia Uniform Arbitration Act and the FAA.[3] The decisions of the lower courts are consistent that such an action collaterally attacking an arbitration through claims of breach of contract, fraud, negligence and tort is not permitted. *Corey v. New York Stock Exchange*, 691 F.2d 1205, 1212 (6th Cir. 1982); *Foster v. Turley*, 808 F.2d 38, 41-42 (10th Cir. 1986). *See also Tamari v. Bache & Co. (Lebanon) S.A.L.*, 565 F.2d 1194, 1202 (7th Cir. 1977), *cert. denied*, 435 U.S. 905 (1978); *Austern v. Chicago Board Options Exchange, Inc.*, 716 F. Supp. 121, 124 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 882 (2d Cir. 1990), *cert. denied*, 498 U.S. 850 (1990).

The only possible purpose for granting certiorari in such circumstances would be to consider reversing existing precedent. Respondents respectfully submit there is not good cause to reverse existing precedent. However, even if the Court were to consider that step, this case given the, at best, amorphous claims of injury and Petitioners' dilatoriness in bringing their claims is not an appropriate one by which to establish a new standard. Petitioners' claims, as they present them, are inherently contradictory. On the one hand, they claim they were damaged by alleged wrongful conduct in the arbitration (although they do not specify any damages). On the other hand, they do not contest the integrity or sufficiency of the award. Indeed, they advise the Court they are satisfied with the award.

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[3] The Petitioners' civil action does not allege wrongs or fraud by the arbitrators themselves.

The practical effect of reversing existing precedent under these circumstances would be to encourage parties to chip away at the arbitration process and commence new and independent actions based on a new and collateral issue, even where they are satisfied with their arbitration award. Such a result would foment unnecessary litigation and eviscerate the strong federal policy favoring arbitration declared in Section 2 of the FAA, 9 U.S.C. § 2. *See, e.g., Southland Corp. v. Keating,* 465 U.S. 1, 10-11 (1984) (§ 2 of FAA "declared a national policy favoring arbitration"); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

II. TO SANCTION THE PETITIONERS' ATTEMPT TO COLLATERALLY ATTACK AN ARBITRATION AWARD THROUGH AN INDEPENDENT CIVIL ACTION WOULD EVISCERATE THE STRONG FEDERAL POLICY FAVORING ARBITRATION.

Arbitration is a voluntary process governed by contracts between the parties and the statutes which govern those contracts. *E.g., Southland Corp. v. Keating,* 465 U.S. at 7 and 10-11. One of the essential aspects of arbitration which attracts parties to the process is the finality which arbitration statutes accord arbitration awards—thereby precluding the expense and delay of protracted litigation. *See, e.g., id.* Thus, judicial review of arbitration is limited to narrowly drawn statutory exceptions such as fraud and corruption, and courts traditionally exercise great caution when asked to set aside an arbitration award. *See, e.g., Foster v. Turley,* 808 F.2d at 41-42.

By electing to arbitrate their claims, parties elect to be bound by the more limited judicial review applicable to arbitration. Those remedies, however, specifically protect the integrity of the arbitration process. Pursuant to the express remedies of the District of Columbia Uniform Arbitration Act, D.C. Code § 16-4311, and Sections 10

and 12 of the FAA, courts in the District of Columbia have broad authority to vacate arbitration awards and remand proceedings to the arbitrators for rehearing where an arbitration award was obtained by "fraud, corruption and undue means." D.C. Code § 16-4311; 9 U.S.C. §§ 10 and 12. Consistent with the concepts of finality, parties are granted ninety days in which to seek judicial review after such grounds are known or should have been known. D.C. Code § 16-4311; *see* 9 U.S.C. §§ 10 and 12.[4]

Petitioners, however, by commencing an independent civil action inexplicably but purposely sought to circumvent the process and time limitations established by the District of Columbia Uniform Arbitration Act and the FAA for review of arbitration proceedings. Petitioners not only purposely eschewed the express statutory remedies, but also waited far beyond ninety days from notice of the alleged wrongs to commence their action (App. at 6a).

Any ruling permitting collateral attack on the integrity of concluded arbitration proceedings through independent civil actions would eviscerate those statutes and undermine the arbitration process by effectively eliminating the concept of finality. Pursuant to Petitioners' theory, no award could ever become final as long as a new lawsuit can be commenced to challenge the arbitration proceeding.

Contrary to Petitioners' assertion (Petition at 31-32), the statutory remedies provide the opportunity for full

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[4] The District of Columbia arbitration statute expressly incorporates a "discovery" rule. D.C. Code § 16-4311(b). The ninety-day period for seeking judicial review based on corruption, fraud or other undue means begins to run only when such grounds are "known or should have been known." (*Id.*) As the Court of Appeals opinion observed (App. 5a and n.6), the FAA does not have an express discovery rule, but federal principles of tolling should apply. *See Foster v. Turley*, 808 F.2d at 42; *see also, Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). This case does not warrant granting certiorari to address the tolling issue under the FAA, because Petitioners did not seek judicial review within the ninety-day period, even if tolled. (App. 6a.)

redress of any fraud or corruption in an arbitration. Where an award was procured by corruption, fraud or undue means, courts may vacate the award and direct a rehearing *by the arbitrators.* D.C. Code § 16-4311; 9 U.S.C. § 10. This remedial scheme appropriately allows the arbitrators themselves ultimately to determine what effect the alleged fraud had on their perception of the evidence and resolution of the case and what amount of damages, if any, should appropriately be awarded to compensate the wronged party. Parties corrupting the arbitration process thus do face liability for their wrongs.

The specific claims of the Petitioners here are particularly untenable because the Petitioners in fact are satisfied with the monetary amount of their award. However, even in these circumstances, had the Petitioners followed the statutory remedies available to them and convinced a court that an alleged fraud had occurred in the arbitration, on remand from the court the Petitioners could have asked the arbitrators to augment the award to include redress for fraud in the arbitration.

III. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH OTHER COURT DECISIONS.

The Court of Appeals correctly decided that Petitioners' civil action did not lie because it is not within the exclusive remedies provided in the arbitration statutes for challenging conduct that taints an arbitration award and was not brought within the statutory time limitations for seeking such relief after notice of the wrongful conduct. (App. at 6a-9a.) Its opinion is in accord with the prior decisions of the other courts on the subject. *See* authorities cited at page 5, *supra.*[5]

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[5] The decision in *Mian v. Donaldson, Lufkin & Jenrette Securities Corporation,* Docket No. 92-9166 (2d Cir. filed Oct. 18, 1993) (*per curiam*), would permit a civil action to be brought to redress violations of federal civil rights statutes that occur during an arbitration proceeding. Respondent respectfully submits this recent

Petitioners fail to cite even a single case to support their central contention that an independent civil action outside the strictures of arbitration statutes may be brought to redress fraud, corruption and undue means which allegedly occurred *within* an arbitration proceeding. The line of cases on which Petitioners seek to rely are factually distinguishable from this case and address a wholly different principle of law irrelevant to the resolution of the question presented here—whether a prior arbitration has a preclusive effect on matters occurring *outside* that arbitration.

None of Petitioners' cases address the issue presented here, which is not whether a claim has been entirely precluded from adjudication by a prior arbitration, but, rather, what process and procedures will govern resolution of it. The Petitioners' action was not dismissed because the claims were precluded from further adjudication based on the prior arbitration; it was dismissed because the claims were neither timely initiated nor in compliance with the proper statutory process and procedure for their resolution.

Williams v. E.F. Hutton & Co., Inc., 753 F.2d 117 (D.C. Cir. 1985), held that a prior arbitration decision does not preclude later litigation of different claims which (i) did not arise in the arbitration, (ii) were not in fact resolved in the arbitration proceeding, and (iii) were not within the scope of matters to be arbitrated under the arbitration agreement between the parties. (*Id.* at 119-20.) It thus has no application to the issue here regarding the remedies for matters arising within an arbitration proceeding itself.[6]

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decision has no application to the facts here, which do not involve civil rights claims.

[6] In *Williams*, a brokerage customer brought an arbitration against the firm for securities violations based on particular transactions in his account. After conclusion of that arbitration, the customer brought a lawsuit for damages based on what the court

Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049 (2d Cir. 1990), held that an arbitration award did not preclude a court which had previously issued an injunction relating to the arbitration from deciding a later claim for damages based on grounds that the injunction was wrongfully entered, where the issue of wrongful injunction was not before the arbitrators and it was unclear they had authority to grant relief against the injunction bond filed in the district court. (*Id.* at 1055-56.) As the Court of Appeals explained, the alleged misconduct in *Blumenthal*—the obtaining of a wrongfully-issued injunction by Merrill Lynch—took place in a judicial proceeding sepaarte from the arbitrators, not within the arbitration itself. (App. 8a, n.9.)

In contrast to *Blumenthal,* where the alleged wrong occurred in a judicial proceeding separate from the arbitration, here there is no dispute that the matters at issue arose in the context of the arbitration itself. Moreover, there is no dispute that the arbitrators had authority to grant relief redressing fraud affecting the proceeding.[7]

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assumed were transactions *different* from those which were the subject of the arbitration. (*Id.* at 119.) The district court dismissed the case on grounds that the transactions which were the subject of the litigation "could have" been adjudicated in the arbitration. (*Id.* at 118.) The court of appeals reversed, holding that because the arbitration proceeding and the later litigation concerned *different transactions and* the transactions involved in the litigation *were not required* under the arbitration agreement to be arbitrated, the arbitration did not necessarily preclude the later litigation. (*Id.* at 119-20.)

[7] The other decisions cited by Petitioners similarly held that an arbitration award will not have a preclusive effect on factual issues and claims that are outside the arbitration proceeding, an issue not relevant here. *Grand Bahama Petroleum Co. v. Asiastic Petroleum Corp.*, 550 F.2d 1320 (2d Cir. 1977) (questions of the preclusive effect of an arbitration award need not be addressed where the issue in a later judicial case was not the subject of the previous arbitration); *Meldeau International Inc. v. Goodyear Tire & Rubber Co.*, 750 F. Supp. 1574 (S.D. Fla. 1990) (arbitration of breach of

CONCLUSION

For all the foregoing reasons, the Petition should be denied.

Respectfully submitted,

CHARLES R. MILLS
(Counsel of Record)
MICHAEL SOLINSKY
LORD DAY & LORD, BARRETT SMITH
1201 Pennsylvania Avenue, N.W.
Suite 821
Washington, D.C. 20004
(202) 393-5024
Counsel for Respondent

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contract claims does not preclude litigation of distinct claims of tortious interference and slander arising outside the contract); *Chestnut Hill Development Corp. v. Otis Elevator Co.*, 739 F. Supp. 692, 698 (D. Mass. 1990) (*res judicata* bars a second action following an arbitration on any issues plaintiff had a fair opportunity to litigate and that was specifically decided by the arbitrator or necessary to his decision even if plaintiff asserts a new theory of recovery or seeks a new remedy).